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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1126.

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,

Petitioner,

v.

JOSEPH MULLER CORPORATION ZURICH,

Respondent.

BRIEF IN OPPOSITION.

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v.

JOSEPH MULLER CORPORATION ZURICH,

Respondent.

BRIEF IN OPPOSITION.

Questions Presented.

1. Where the laws of the state or country in which a corporation is organized give to such corporation "capacity to sue or be sued" may such corporation sue or be sued in any jurisdiction in which process is served upon the defendant?

2. Once such corporation has the "capacity to sue or be sued," did the U. S. District Court acquire jurisdiction of the subject matter notwithstanding the provisions of the 1869 treaty between France and Switzerland?

3. Having acquired jurisdiction of the person of the petitioner, does the U. S. District Court have jurisdiction of the subject matter, particularly that which is in-

volved in an anti-trust action, where there are no comparable anti-trust statutes either in France or in Switzerland?

ARGUMENT.

This case does not involve any conflict with the decisions of this court. Nor is there any conflict among the circuits. Neither is there any constitutional question involved. Nor is there any denial of equal protection.

The question presented to the court below was a simple one, to wit; where the petitioner was "operating and doing business either in its own name or under the name of an agency and/or subsidiary and/or direct representatives, in the City of New York in the United States of America" (4a, 22a) (which allegations in the complaint must be deemed admitted for the purpose of the motion to dismiss), and service of the summons and complaint was made upon the petitioner within the City and State of New York, did the District Court acquire jurisdiction of the petitioner as well as of the subject matter of this litigation?

As we shall point out, the treaty between France and Switzerland on which petitioner relies does not deprive the District Court of jurisdiction of the subject matter.

POINT I.

Petitioner has the burden of proof, but failed to sustain it in its petition.

It is elementary law that on an application for a writ of certiorari to this court, the petitioner has the burden of proof to show error in the court below (*Higgins v. Carr Bros.*, 317 U. S. 572, 574). Respondent respectfully sub-

mits that such burden was not sustained by the petitioner.

POINT II.

There is no inconsistency in the decision of the Court of Appeals which sustained the complaint in the anti-trust action while at the same time it dismissed the complaint in the contract action.

The Court of Appeals, in dismissing the complaint in the breach of contract action, stated that "United States Courts should decline to exercise jurisdiction over a purely private action such as the contract suit here in issue." Undoubtedly the Court of Appeals was influenced by the fact that the District Judge (MacMahon, J.) stated in his opinion that the issues involved in the contract action were subject to arbitration between the parties and that, therefore, staying the trial of the contract action pending arbitration, was not sufficient, and that in view of the fact that the contract action was being arbitrated, that same should be dismissed.

POINT III.

The respondent has the capacity to sue in the U. S. District Court, Southern District of New York.

Petitioner contends that the treaty between Switzerland and France provides in substance that any civil or commercial action between French and Swiss Nationals is required to be instituted in the country of the defendant. This, however, does not in any way rule out respondent's right to bring and to prosecute this action in the United States Courts.

Rule 17(b) of the Federal Rules of Civil Procedure provides that: "the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Rule 17(b) deals merely with the "capacity to sue or to be sued." It does not deal with the place where the action is to be commenced or prosecuted. As *Barron & Holtzoff* pointed out in Volume II of their work on Federal Practice and Procedure (1961), §485 (p. 40):

> "It is generally recognized that this provision relates only to the capacity to sue and be sued and not to the place of suit. Consequently, if a corporation can sue, it can be sued anywhere."

Similarly, *Wright and Miller Federal Practice and Procedure* (1971), Volume 6, §1561, page 733, re-affirms the rule enunciated in *Barron & Holtzoff* (*supra*), stating:

> "Rule 17(b) does not require a Federal Court to honor a State practice of chartering corporations so that they will be subject to suit only in its own courts. It is generally recognized that the second sentence of Rule 17(b) relates only to following state law with regard to corporate capacity to sue and be sued, *and not to the place of suit.* Consequently, if a corporation is empowered to sue or be sued in its state of organization, then it can sue or be sued in any Federal Court." (Italics supplied.)

Petitioner does not contend that, under the Swiss Law which created Muller, Muller has no capacity "to sue or to be sued," nor that, under the French Law which created Saga, Saga has no capacity "to sue or to be sued." It must therefore be assumed that such capacity was granted to both of them and, under the circumstances, this action was properly brought in the U. S. District Court.

> "The capacity to sue is one thing and how, when, and *where* to sue, is another, and we must always bear in mind that we are dealing only with capacity, technical capacity. This rule simply means this, that if under the law of Delaware, a corporation is organized and under the law of its domicile, Delaware, it has the capacity to sue or be sued, then it can be sued or sue anywhere". (*Hearings Before Committee on Judiciary, U. S. House of Representatives*, 75 Cong. Third Session, Serial 17, 1938, p. 20).

> "Statements made by legislators in debate can be a part of the legislative history which guides courts in statutory construction" (*Epstein v. Risor* [1969], 296 F. Supp. 214, 216, affirmed [1970] in 421 F. 2d 930).

This court in *Carolene Products Co. v. United States* (323 U. S. 18 at p. 28) (1944), held that the Supreme Court, in determining legislative intent, would take judicial notice of the reports of the House and Senate committees.

This would also apply to hearings held before legislative committees.

If petitioner's contention were to be sustained, then a foreign country creating a corporation, or any of the states in the United States creating a corporation, would have the right to immunize its corporation against being sued in any court other than in the court or state of its creation. This is an undue restriction on the jurisdiction of the Federal Courts of this country and, as was held in *Hellrung v. LaFayette Loan & Trust Co.* (1951), 102 Fed. Supp. 822 at page 823:

> "A State cannot by statute restrict the power of the Federal Courts to hear and determine suits within their concurrent jurisdictions. (*Waterman*

> *v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43, 44; *United States v. People's Trust & Savings Co.*, 97 F. 2d 771) • • •. The authority of these cases cannot be weakened or avoided by the observation that they were decided prior to the adoption of Rule 17(b) since that rule apparently was merely declarative of existing law. (Cf. *Moore v. Mitchell, et al.* [1930], 281 U. S. 18, 23.)"

It cannot be said that where the Federal Courts have jurisdiction, that a state or a foreign country can insulate a corporation formed under its laws against lawsuits in any jurisdiction other than the particular state or country of incorporation.

Such a restriction, whether contained in the statutes of a state, or a foreign country, or even if contained in a treaty between two foreign nations, would be contrary to the public policy of the United States, particularly when it refers to interstate or foreign commerce.

The rule enunciated in *2 Barron & Holtzoff* (above referred to) was cited with approval in *John W. Johnson, Inc., and F. W. Lyles, Inc., v. Atlantic States Construction Company* (1967), 276 F. Supp. 379, wherein the court at page 385 said:

> "It appears clear that the second sentence of rule 17(b) 'relates to the capacity to sue and be sued and not to the place of suit.' Consequently, if a corporation can sue, it can be sued anywhere. (*2 Barron & Holtzoff*, Federal Practice & Procedure, ¶485, p. 40), citing testimony given during hearings before the Committee on Judiciary of the United States House of Representatives and other supporting historical references.
>
> "Some objectors asserted that • • • [the provision concerning the capacity of a corporation to sue and be sued] would give the state of incorpora-

> tion the right of limiting the suability of a corporation in all other states. We felt quite clearly that this was a misuse of the term 'capacity,' that capacity dealt merely with suability, *and that once a corporation was endowed with the general character of the corporate entity, such as we know it, that then it could not be provided that it was not subject to the liabilities of a corporation* • • •." (*Proceedings of Cleveland Institute on Federal Rules*, 1938, p. 258.) (Italics supplied.)

The Court of Appeals properly agreed with the District Court's conclusions when it stated that "Rule 17(b) deals entirely with the general capacity of a corporation to sue or be sued (citing 6 Wright and Miller, Federal Practice and Procedure, paragraph 1561, at 733-34 [1971], and 3A Moore, Federal Practice, paragraph 17.21 at 771 [2d ed. 1970]) and that since both Joseph Muller and Saga have such a general capacity under the laws of the nations to which they owe their existence, the Franco-Swiss treaty would not constitute a bar to either of these suits if Rule 17(b) were the sole problem in this case."

POINT IV.

The anti-trust action is not covered by the treaty between Switzerland and France.

Petitioner stresses the fact that under the treaty between France and Switzerland the plaintiff had to institute his action before the natural judges of the defendant.

A reading of the language in the treaty is convincing of the fact that it does not cover nor has it any reference to the anti-trust action involved herein. The treaty,

as it states, concerns itself with civil actions based on contract. This is pointed out by Dean Paul Chauveau at 73A, wherein he states:

> "If nonetheless, the purpose of the action *is to enforce a contract* agreed to by the defendant in a place situated either in France or in Switzerland, outside the jurisdiction of the said natural Judges, it may be taken before the Judge of the place where the contract has been concluded, in the event the parties are residing therein at the time the proceedings are to be instituted." (Italics supplied.)

Again, continuing in his affidavit, Dean Chauveau states:

> "Undoubtedly the convention applies to any *dispute concerning a contract* between two parties, since this type of dispute is expressly mentioned in the second paragraph of Article 1" (74A). (Italics supplied.)

The anti-trust action is a statutory action. It is not an action based on contract but is based on a conspiracy in restraint of commercial trade, both interstate and foreign. It is therefore not an action covered by the treaty provisions, but is an action under the Clayton Act, not precluded by the treaty.

Title 15 U. S. C. A., paragraph 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign countries, or with foreign nations, is declared to be illegal * * * every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding Fifty Thousand Dollars, or by

imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

It has been established by a long line of decisions that price fixing in commerce, whether it is reasonable or unreasonable, is *per se* a violation of Clayton Act as restraint of commerce (*U. S. v. New Wrinkle, Inc.*, 342 U. S. 371, 377; *U. S. v. Paramount Pictures*, 334 U. S. 131; *U. S. v. Massanate*, 316 U. S. 265, 274; *U. S. v. Swift & Co.*, 52 F. Supp. 476, 479; *U. S. v. Waltham Watch Co.*, 47 F. Supp. 524, 531; *U. S. v. Detroit Sheet Metal Association*, 116 F. Supp. 81, 86).

No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement "* * * suppresses all competition among the members of the combination, offends the Sherman Act" (*U. S. v. National Lead Co.*, 63 Fed. Supp. 513, 523).

The complaint and the opposing affidavits clearly show that the conspiracy entered into between the petitioner and the other defendants had for its purpose the suppression of competition among them.

The effect of the Sherman Anti-Trust Act and the Clayton Act was to make those contracts in restraint of trade, which were void at common law, unlawful in a positive sense and created a civil liability for damages in favor of the injured party (*Dennison Mattress Factory v. Spring Air Company*, 308 Fed. 2d 403, 407; *Timken Roller Bearing Co. v. U. S.*, 341 U. S. 593, 598).

This difference between an action based on contract and one based on a conspiracy in restraint of trade has been repeatedly pointed out by our courts.

In *U. S. v. Kissel* (1910), 218 U. S. 601, the Supreme Court at page 608 said:

> "A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself."

In *U. S. v. Waltham Watch Co.* (1942), 47 Fed. 524, the court at page 532 said:

> "A conspiracy in restraint of trade is different from a contract in restraint of trade. 'A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself' (*U. S. v. Kissel*, 218 U. S. 601). No final agreement is necessary for the formation of a conspiracy. It may be shown by concert of action among the conspirators, all working together for a common purpose."

In *U. S. v. General Electric Co.* (1941), 40 Fed. Supp. 627, the court at page 630 said:

> "A contract in restraint of interstate and foreign commerce is condemned in Section 1 of the Sherman Anti-Trust Act. So is a conspiracy in restraint of such trade. The contract is not necessarily the same as the conspiracy. *In United States v. Kissel*, 218 U. S. 601, 608, the Court said: 'A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself.'"

In *John Wright Associates, Inc., v. Ullrich* (1962), 203 Fed. Supp. 744, the court at page 750 said:

> "If the end sought is monopoly, it is of no consequence that the means were lawful or unlawful. No formal agreement is necessary to establish a conspiracy and business behavior is admissible as circumstantial evidence from which an illegal agreement may be inferred."

In *American Tobacco Co. v. United States* (1946), 328 U. S. 781, the court at page 809 said:

> "No formal agreement is necessary to establish an unlawful conspiracy."

In *U. S. v. L. D. Caulk Company* (1954), 126 F. Supp. 693, the court at page 704 said:

> "So also many authorities are cited to the effect that there need be no formal written agreement or contract to constitute a Sherman Act violation; that is enough that a concert of action is contemplated and that the defendants conformed to the arrangement! * * * As to this principle I entertain no measure of dissent."

In *U. S. v. Zellerbach Corporation* (1956), 141 F. Supp. 118, the court at page 127 said:

> "The combinations which the Sherman Act prohibits are not limited to enforceable contracts in writing."

In *Standard Oil Company of California v. Moore* (1958), 251 Fed. Rep. 2d 188, the court at page 211 said:

> "No express agreement is necessary to constitute an unlawful combination or conspiracy (*American Tobacco Co. v. U. S.*, 328 U. S. 781, 809). It is sufficient if persons with knowledge that concerted action was contemplated and invited, 'give adherence to and then participate in a scheme' (*Federal Trade Commission v. Cement Institute*, 333 U. S. 683)."

Sections 1 to 7 of the Clayton Act are primarily criminal in their nature.

In *U. S. v. Procter and Gamble Company* (1959), 180 F. Supp. 195, the court at page 203 said:

> "* * * The Sherman Act is primarily a criminal statute, its first three sections declaring certain acts illegal and prescribing punishment therefor."

In *U. S. v. Cooper Corporation* (1940), 31 F. Supp. 848 (aff'd in 114 F. 2d 413, certiorari denied in 312 U. S. 600), the court at page 850 said:

> "The courts have pointed out that a violation of the (Sherman) Act was a statutory offense, of a penal nature, in which the right is given to an individual to recover for injury to his business or property with three-fold damage."

The word "person" or "persons" as contained in Chapter 1, Title 15 U. S. C. A., is defined in Section 12 thereof as follows:

> "The word 'person' or 'persons' whenever used in this act shall be deemed to include corporations or associations existing under or authorized by the laws of either the United States, the laws of any

> of the territories, the laws of any State or the laws of any foreign country."

Accordingly the respondent, though a corporation organized under the laws of Switzerland, is one of the "persons" authorized to commence an action under the Clayton Act.

As to where such suit may be brought, Title 15 U. S. C. A. Chapter 15 ¶15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws, may sue therefor in any District Court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

We respectfully submit that the respondent has met each of the conditions contained in paragraph 15 above quoted, in that it is (1) a person injured in its business or property; (2) by reason of anything forbidden in the anti-trust law; and (3) that it therefore has the right to bring the action "in any District Court of the United States in the district in which the defendant resides, or is found, or has an agent."

It is undisputed that the summons and complaint herein was served on the petitioner in the City of New York.

POINT V.

Public policy does not require the United States to follow the provisions of the Franco-Swiss Treaty, to which it is not a party, particularly when that treaty runs counter to the public policy of the people of the United States.

On page 16 *et seq.* of its petition, petitioner argues that our Federal Courts must follow blindly the provisions of the Franco-Swiss Treaty (to which the United States was not a party) and to deny access to our Federal Courts of cases which vitally affect interstate and foreign trade of citizens of the United States.

On page 16 of its petition, petitioner states:

> "Consideration must also be given to the question of whether a judicial determination by a United States Court that a Swiss and/or French corporation may bring suit against the other in the Courts of the United States, despite the limitation and express prohibition of the Franco-Swiss Treaty, *would embarrass or interfere with the executive branch of the United States Government in its dealings with the Republic of France and this Swiss Republic.*" (Italics supplied.)

In advancing this argument petitioner completely overlooks the fact that the anti-trust statutes of the United States were intended for the protection of the American public as well as the individual litigant involved (*Radovich v. National Football League* [1957], 352 U. S. 445, 454; *Paramount Famous Lasky Corporation v. United States*, 282 U. S. 30, 42; *Shotkin v. General Electric Co.* [1948], 171 F. Rep. 2d 236, 239; *Brenner v. Texas Company* [1956], 140 F. Supp. 240, 242; *Davidson v. Kansas City Star Company* [1962], 202 F. Supp. 613, 617; *Ruddy*

Brook Clothes, Inc., v. British Foreign & Marine Ins. Co. [1951], 103 F. Supp. 290, 291, aff'd 195 F. 2d 86; *Arthur v. Kraft-Phenix Cheese Corporation* [1938], 26 F. Supp. 824, 825).

That being the intent of the law, a party charged with violation of that law should not be permitted to escape liability because of a foreign treaty which is inimical to the interests of the American public and makes it possible for a wrongdoer to escape liability for a wrong done to the public.

If petitioner were to be successful in dismissing the complaint, there would be no way for the respondent to obtain redress for itself or the public, for neither France nor Switzerland have any statute comparable to the Clayton Act.

The complaint in this action alleges (and, as pointed out, *ante*, those allegations must be deemed admitted for the purpose of this application that respondent was in the business of purchasing from the Ethyl Corporation in Virginia, Louisiana and Texas a liquid known as V. C. M. for transportation to its customers in Eurpoe and that the original charter agreement between respondent and the defendants, Saga and Petromar, required the said defendants to furnish the necessary means of loading, transportation, tankers and facilities for that purpose, as well as unloading facilities in Eurpoe (5A, 6A, 26A, 27A).

Accordingly, the contract involved and affected American and foreign commerce and shipping, and the actions of the defendants in the anti-trust case involved restraint of trade or commerce with foreign nations, thus definitely affecting the public interest of the United States. The only redress respondent has is under the Clayton Act,

there being no comparable anti-trust act either in Switzerland or in France.

> "It is plain that where American foreign commerce is affected, foreigners may be held under our Anti-trust laws for restraints thereon" (*Pacific Seafarers, Inc., v. Pacific Far East Line, Inc.* [1968], 404 F. 2d 804, 817).

In *United States v. The Watchmakers of Switzerland Information Center,* 133 F. Supp. 40 (motion for reargument denied in 134 F. Supp. 710), the court at page 46 said:

> "Coming to the question of whether a trial in this forum would subject the defendants to unfair inconvenience, it appears that there is no forum more convenient than this. As in *Latimer v. S/A Industries Reunidas F. Matarazzo, supra* (175 Fed. 2d 194), defendant's home office is in a foreign country. Further, in this case, the relief sought could not be obtained there. The laws alleged to be violated are those of this forum. Many of the acts upon which the claim is based occurred here, although probably more occurred in Switzerland."

Thus the present cases come clearly within the decision of *United States v. Hamburg-American-Amerikanische-Packet-Fahrtactien-Gesellschaft* (1911), 200 Fed. Rep. 806, where the court carefully considered the question of international complications, and at page 806 said:

> "It may be accepted without discussion that transportation of passengers between this country and Europe forms a part of the commerce of the United States with foreign nations. It is also clearly established that Congress has power to prohibit all contracts, combinations and conspiracies in restraint of such part of the foreign commerce of the United States."

Continuing with page 807 the court said:

> "The agreement directly and materially affects foreign commerce and is partly intra-territorial because it is to be carried out in part in the United States. * * *.
>
> "The prohibitions of the anti-trust statute apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce and if it unlawfully restrains it, it comes within the statute. We see nothing to warrant the contention that the act should be narrowly interpreted as prohibiting only contracts which are to be performed only within the territorial jurisdiction of the United States nor—*if it were for us to consider—any reason for concluding that a broader construction would lead to international complications.* * * *" (Italics supplied.)

> "Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into by citizens of this country. The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce? As said by the Circuit Court of Appeals for this Court in *Thomsen v. United Castle Mail S. S. Co.*, 166 Fed. 251:
>
> "'That the combination was formed in a foreign country is likewise immaterial. It affected the foreign commerce of this country and was to be put into operation here.'
>
> "Whether or not the statute is directed against all combinations in restraint of competition, it is certain that it embraces those *in which the purpose and effect are to charge arbitrary and excessive transportation rates.* Whether the statute

> be broadly or narrowly construed, it is clear that its prohibits combinations and conspiracies to restrain the business of transporting passengers when accompanied with acts of oppression and attempts to monopolize." (Italics supplied.)

Accordingly the question of whether the decision of the court below "will embarrass or interfere with the executive branch of the United States Government in its dealings with the Republic of France and the Swiss Republic" is immaterial where it clearly appears that the public interest is involved and prejudice will result to citizens of the United States in denying to the respondent its right to proceed in the courts of this country.

When the *Thomsen* case (*supra*) eventually came before the United States Supreme Court, this court, in 243 U. S. 66, reaffirmed the principle that even though the combination in restraint of trade was formed in a foreign country it is within the proscription of the anti-trust laws. In that case the United States Supreme Court at page 88 said:

> "It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the Act of Congress; and that, besides, the principals in the combination, and not their agents, were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here (*United States v. Pacific & A. R. & Nav. Co.*, 228 U. S. 87, 33 Sup. Ct. Rep. 443). It, therefore, is within the law, and its managers here were more than simply agents, they were participants in the combination."

Both the Sherman Act and the Clayton Act apply to conspiracies in restraint of trade, entered into in foreign countries, if such conspiracies affect foreign commerce

of the United States. "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequence within its borders which the state reprehends" (*United States v. Aluminum Co. of America*, 148 Fed. Rep. 2d 416, 443).

In *Dennison Mattress Factory v. Spring-Air Company* (1962), 308 Fed. 2d 403, the court, at page 413, said:

> "The purpose of the anti-trust laws is to prevent a select few in a particular field from achieving such monopolistic power to stifle competition."

The complaint in this action alleges that part of the conspiracy in restraint of trade, charged against petitioner and the co-defendants, consisted of acts committed within the territorial limits of the United States. The second cause of action charges the petitioner and its co-defendants with approaching respondent's suppliers in the United States in an effort to obtain from them quantities of V. C. M. for shipment by petitioner to respondent's customers abroad, in violation of the confidential information furnished by respondent to petitioner for the purpose of arranging shipment schedules. Those acts were part of a conspiracy to by-pass the respondent and to deprive it of profits which respondent would have made by purchasing that product from American suppliers for shipment to its customers abroad (these allegations must be deemed admitted for the purposes of the motion to dismiss the complaint). It thus appears that the conspiracy which petitioner entered into in Europe was continued by it within the territorial limits of the United States, and that it was part of the purpose of petitioner to obtain a monopoly and to stifle competition.

> "Comity is a courtesy which one state extends to another by enforcing the laws of such other state when it is proper to do so, and such law is not contrary to the public policy of the state" (*County Court of Wayne County, W. Va., v. Louisa & Fort Gay Bridge Co., Inc.* [1942], 46 F. Supp. 1, 3).

The rule of "comity" does not apply where the foreign law (as in this case) is contrary to the public policy of the United States.

Recognition of the Franco-Swiss Treaty would violate a fundamental principle of public policy and justice, a prevalent conception of good morals and a deep-rooted tradition of the common weal.

Public policy therefore does not prohibit the asssumption of jurisdiction by the United States Courts of the case at bar.

On page 18 of its petition, petitioner refers to the letter sent to the Court of Appeals, Second Circuit, by the Department of State. In that letter, the Department of State said:

> "It is well settled in international law that an agreement between two countries does not create obligations on a third country if that country is not a party to the agreement nor has consented to its terms. 'A Treaty does not create either obligations or rights for a third state without its consent.' (Article 34, Vienna Convention on the Law of Treaties of April 30, 1970; Official Records of U. N. Conference on the Law of Treaties, Documents of the Conference, 289, 294); 'An international agreement does not, *per se*, impose an obligation upon a state not a party to it without the consent of that state.' (Restatement [Second], Foreign Relations Law of the United States §139). It appears that even the appellant SAGA, although

suggesting that the 1869 French-Swiss Treaty should be given effect by U. S. Courts, is not asserting that the Treaty is binding as a matter of international law on the United States. For instance, in the affidavits submitted on behalf of SAGA, Dr. Paul Chauveau recognizes that "[t]he obligation to automatically disclaim their jurisdiction wherever the case may be is made only to Swiss and/or French courts, as the negotiators of the treaty had no power to give orders to the courts of other countries such as U. S. courts" (affidavit of Paul Chauveau, 77a §9).

CONCLUSION.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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